

The Changing International Law of High Seas Fisheries

Francisco Orrego Vicuña



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1 The evolving principles and concepts of international law in high seas fishing

Freedom of fishing in the high seas in a historical setting

The contemporary law of the sea has attained an important degree of elaboration during its evolution, as evidenced in particular by the detailed provisions of the 1982 United Nations Convention on the Law of the Sea.¹ Notwithstanding this significant legal progress, many of its underlying principles and concepts are still strongly influenced by ancient rules of customary international law. Most notable among these rules is the principle of the freedom of fishing in the high seas. Many of the changes experienced in the context of this international legal process during the twentieth century have been founded not so much in the creation of new principles and concepts as in the interpretation and reformulation of traditional rules of international law. Historical linkages have thus kept their influence in the shaping of contemporary international law, combining traditional values with the needs of modernization of legal rules and structures.

The problem that has prompted most of the disagreements characterizing this evolution has been that the interpretation and reformulation of traditional legal rules has not always been faithful to their true meaning and extent, or having so been has not always drawn the full set of legal implications and consequences of the change envisaged. The different interests of states have of course played a major role in this changing legal context.

All modern developments on the law of the sea have been closely connected to the principle of the freedom of the high seas. New concepts,

¹ United Nations Convention on the Law of the Sea, 10 December 1982, UN Doc. A/CONF. 62/122, *International Legal Materials*, Vol. 21, 1982, 1261. Hereinafter cited as Convention on the Law of the Sea.

such as state jurisdiction over the contiguous zone or later over the continental shelf and the exclusive economic zone, had to be made compatible with the freedom of the high seas to a given extent if they were to become admitted into the body of international law. This is of course quite natural because classic international law had been structured on the existence of only two broad types of maritime areas: the territorial sea and the high seas.²

The manner in which that compatibility could be attained depended in essence on the content attributed to the principle of the freedom of the high seas. As evidenced by the very evolution of international law the meaning and extent of such a principle can change with the different economic, political, and scientific perceptions prevailing at a given moment in the community of nations. It follows that the principle is not a fixed dogma and that it may be subject to a process of adaptation according to the realities characterizing significant historical periods.

The principle of the freedom of the high seas emerged as a reaction to the pretension of subjecting the high seas to the territorial sovereignty of some naval powers in the fourteenth and fifteenth centuries.³ The original meaning of the principle was in essence a negative one since it only sought to prohibit the interference of states in the high seas. Two consequences would follow from this formulation: on the positive side one result was the freedom of utilization of the high seas; but on the negative side there were also “les désordres, les destructions, les gaspillage.”⁴ These negative aspects are at the very heart of the evolution that the principle has been experiencing along its historical evolution.

Grotius' conception of the principle of the freedom of the high seas was founded, as is well known, on two basic premises: the impossibility of the sea being subject to effective occupation and the inexhaustible nature of marine resources.⁵ The latter aspect, however, should be carefully examined in his fundamental work on *The Freedom of the Seas*.⁶ In point of fact,

² F. V. Garcia Amador, *La Utilización y Conservación de las Riquezas del Mar*, 1956, at 3; also published as *The Exploitation and Conservation of the Resources of the Sea*, 1959.

³ United Nations, “Memorandum on the Regime of the High Seas, prepared by the Secretariat,” Doc. A/CN. 4/32, 14 July 1950, *Yearbook of the International Law Commission*, 1950, Vol. II, 69. The preparation of this memorandum is attributed to Gidel. H. Lauterpacht, “Sovereignty over submarine areas,” *British Yearbook of International Law*, 1950, at 408, note 1.

⁴ United Nations, “Memorandum,” para. 11.

⁵ Lauterpacht, “Sovereignty,” at 399. See also generally Pitman B. Potter, *The Freedom of the Seas in History, Law, and Politics*, 1924.

⁶ Hugo Grotius, *The Freedom of the Seas*, edited with an introductory note by James Brown Scott, Oxford University Press, 1916.

Grotius indeed stated that the “same principle which applies to navigation applies also to fishing, namely, that it remains free and open to all,”⁷ following closely on this point the writings of Vasquez who is quoted as justifying the right of nations over the sea on the ground that “the same primitive right of nations regarding fishing and navigation which existed in the earliest times, still today exists undiminished and always will, and because that right was never separated from the community right of all mankind, and attached to any person or group of persons.”⁸ But in so stating Grotius was also very clear that fish are exhaustible and drew on this point the fundamental difference between the freedom of fishing and the freedom of navigation: “And if it were possible to prohibit any of those things, say for example, fishing, for in a way it can be maintained that fish are exhaustible, still it would not be possible to prohibit navigation, for the sea is not exhausted by that use.”⁹

The Grotian distinction was largely ignored and the sea as *res communis* came to be understood as the natural legal consequence of his writings.¹⁰ However, as experience would demonstrate before long, the understanding that fishing was not exhaustible turned out not to be true. In any event the principle came to identify the freedom of navigation and the freedom of utilization of the resources of the sea, with particular reference to the freedom of fishing, as its main components. It then became firmly established as a rule of customary international law, where it has remained independently of the legal considerations present in its origins.¹¹ But this does not mean of course that changes and adaptations inspired in new circumstances were prevented from intervening.

It is noteworthy that Grotius himself was quite aware of the shortcomings that the concept of *res communis* entailed, for he also wrote in his work:

If today the custom held of considering that everything pertaining to mankind also pertained to one's self, we should surely live in a much more peaceable world. For the presumptiveness of many would abate, and those who now neglect justice on the pretext of expediency would unlearn the lesson of injustice at their own expense.¹²

These are the very thoughts underlying today's discussions on the global commons and the need to introduce regulatory elements on high seas fishing, including eventually the question of privatization of fishing rights.

⁷ *Ibid.*, at 32.

⁸ *Ibid.*, at 56–57.

⁹ *Ibid.*, at 43.

¹⁰ García Amador, *La Utilización*, at 27–28 and the literature cited at note 16 thereof.

¹¹ Lauterpacht, “Sovereignty,” at 399.

¹² Grotius, *Freedom*, at 6.

When the negative implications of the principle came to be realized, various exceptions were introduced. The unrestricted extent of freedom of navigation was modified to exclude piracy and slave traffic, or more recently the shipment of narcotic drugs, and jurisdictional functional elements were correspondingly introduced in terms of the right of boarding and inspection, the right of hot pursuit and other expressions.¹³

Still more significant was the realization that some of the earlier understandings of Grotius' conceptions were no longer valid as time went by. Effective occupation of the high seas has indeed become possible considering technological developments, first in the minor form of occupation of pearl banks and other such exploitation, next by way of the exploitation of the continental shelf, and more recently by means of the exploitation of the deep seabed mineral resources. This reality had of course a major impact on the law, in terms of both the development of new maritime areas subject to national jurisdiction, notably the continental shelf, and the establishment of a new international legal regime governing the seabed mineral activities and related matters beyond the limits of national jurisdiction.

More profound were the implications of the scientific findings and empirical evidence gathered throughout the nineteenth and early twentieth centuries that the living resources of the sea were indeed exhaustible because of overexploitation. Although the problem came to be fully realized only in the late nineteenth century as evidenced by the discussion leading to the *Bering Sea Fur Seals Arbitration*,¹⁴ earlier expressions were already available.¹⁵

Specific legal consequences followed as to the meaning of the principle of the freedom of fishing in the high seas. The latter would no longer be conceived in an absolute manner but subject to the right of other states and participants to undertake fishing activities. It should also be noted that, in the view of influential writers of international law, while the high seas were not subject to national appropriation, neither did they belong to the international community, as all states were equally entitled to its use.¹⁶ Another important legal consequence was that gradually the right of coastal states to introduce conservation measures in the high seas was recognized, first, in relation to its nationals and, secondly, in a limited

¹³ United Nations, "Memorandum," at 70–72.

¹⁴ *Ibid.*, at 73–74.

¹⁵ Gidel, *Le Droit International Public de la Mer*, 1932, Vol. I, at 438–439.

¹⁶ See, for example, Fauchille, Bustamante, and François, as cited by Garcia Amador, *La utilización*, at 27.

manner, in relation to foreigners.¹⁷ This was the central concept on which coastal states could later establish fishing zones of various kinds.

As this legal process evolved the original content of the principle of the freedom of the high seas also experienced significant conceptual changes. The high seas as *res communis* only differed from the concept of *res nullius* in that it did not allow for the exercise of national sovereignty, but it had no influence on the question of the abusive use of the oceans; this situation began gradually to change as the concept of the utilization in the interest of the international community came to be accepted in some respects. Under the latter approach, while the use of the oceans was open to all states, it would nonetheless be subject to some extent to the general interest and not exclusively to individual interests.¹⁸ This assumed some definition of the general interest by the international community and the exercise of regulatory powers on its behalf. Although this approach has seldom been applied to fishing activities, except in limited circumstances or regional arrangements, it underlies many of the recent developments in high seas fishing and had been present in a number of early scholarly discussions. The interesting consequence of such changes was that the principle of the freedom of the high seas was subject, first, to some control of the abuse of rights and, secondly, to a test of compatibility with the general interest.

Most of the discussion that has taken place on the law of the sea has concentrated on the question of expanded coastal state jurisdiction. Given the influence of the new maritime areas on the traditional rules and standards this is quite natural. However, sight should not be lost of the fact that such a development is but one expression of the fundamental changes surrounding the principle of the freedom of fishing in the high seas since its inception. The search for the control of the abuse of rights and the common interest, which is only now becoming an open concern, is linked to the same process of conceptual changes described. In fact, as will be discussed further below, the very jurisdictional trends characteristic of the contemporary law of the sea can be seen not necessarily or exclusively as a selfish expression of national interest but also as the search for regulatory authority which has been lacking under traditional

¹⁷ Gidel, *Le droit international*, at 437–441.

¹⁸ United Nations, "Memorandum," at 73. See also the proposal made by Strupp at the Institut de Droit International emphasizing the interests of the international community, *Annuaire de l'Institut de Droit International*, Session de Paris, 1934, at 550, 712.

international law, the absence of which explains many of the problems of overexploitation and depletion of fishing resources.¹⁹

The issue was clearly stated by a distinguished Latin American scholar in the early nineteenth century:

There is no reason which would legitimize the appropriation of the sea under the aspect now being considered [navigation] ... However, under another aspect, the sea is similar to the land. There are many marine exploitations that are restricted to certain areas; for just as all lands do not give the same fruits, neither do all oceans yield the same products. Coral, pearls, amber, whales, are not found but in limited areas of the ocean, which are impoverished daily and then depleted; and however generous nature may be in other species, it cannot be doubted that the competition of many peoples would render its fishing more difficult and less plentiful, and would end in their depletion, or at least in displacing them to other seas. Not being, therefore, inexhaustible, it seems that it would be licit for people to appropriate the areas where those species are found and which are not actually in the possession of others.²⁰

The evolving legal concepts relating to high seas fishing

In the light of the historical setting described above legal concepts relating to high seas fishing correspondingly evolved as circumstances and interests changed. Three distinct periods can be identified in this regard. First, there was the conceptual development that led from unrestricted freedom of fishing to reasonable use, introducing a measure of restraint as justified by the equal interest of other participants in a given activity of exploitation of ocean resources. Just as happened historically with similar forms of organization of activities relating to common lands and areas, this approach had merit insofar as participants were few and technologies were of an artisan kind, but as soon as these conditions were surpassed the approach became largely ineffective and incapable of ensuring appropriate conservation of resources.²¹

When this situation became obvious in the context of fishing activities

¹⁹ Francisco Orrego Vicuña, "De Vitoria a las nuevas políticas de conservación y aprovechamiento de los recursos vivos del mar," in Araceli Mangas Martín, *La Escuela de Salamanca y el Derecho Internacional en América. Del Pasado al Futuro*, 1993, 139–153, at 153.

²⁰ Andrés Bello, *Principios de Derecho de Jentes*, Santiago, 1832, Complete Works, 1886, Vol. X, at 50. Translation by the author.

²¹ Francisco Orrego Vicuña, "The 'Presential Sea': defining coastal states' special interests in high seas fisheries and other activities," *German Yearbook of International Law*, Vol. 35, 1993, 264–292, at 292.

the need for regulation opened a second major conceptual period.²² This was first identified with the development of national claims to maritime areas, a trend which in part reflected the interest of coastal states in gaining exclusive access to given resources or activities to the exclusion of third parties.²³ But it was also the means to introduce conservation authority in areas that had been until then subject to growing depletion of resources because of the lack of regulatory authority under international law as understood at the time.²⁴ It should be noted in this regard that all major initiatives relating to enlarged claims to maritime areas were associated with problems of conservation in view of the unrestricted activities of high seas fishing vessels. Such claims were legitimate and they brought the interest of coastal states in line with the interest of distant-water fishing nations. Until then the latter nations and not the international community as a whole were the sole beneficiaries of the freedom of fishing in the high seas as understood under traditional concepts.

The need for regulatory authority was not only expressed in terms of national claims to maritime areas. As mentioned above, it also found expression in the concept of exploitation of ocean resources in the general interest of the international community and not exclusively in the interest of individual nations, thus opening the third and latest period in the conceptual changes discussed. While this concept has not been well defined, it has nevertheless permeated many of the solutions found under international law to the competing interests of coastal states and distant water-fishing states. This is indeed the case with the regime of the exclusive economic zone in which the exclusive rights of the coastal state are combined with the right of access of other states to a part of the total allowable catch not exploited by the former.²⁵

Similarly, this concept also underlies a number of developments relating specifically to fishing in the high seas. Regulatory authority entrusted to fishing commissions and other types of institutions or arrangements is an example of this other trend, which has become paramount in recent regional developments and global agreements on

²² Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment*, 1992, at 425.

²³ *Ibid.*, at 507.

²⁴ William T. Burke, *The New International Law of Fisheries*, 1994, at 95.

²⁵ On the regime of the exclusive economic zone see generally David Attard, *The Exclusive Economic Zone in International Law*, 1987; Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, 1989; Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law*, 1989.

high seas fisheries. Conservation is again the driving force behind these developments while at the same time maintaining a balance of interests between coastal states and distant-water fishing states.

Occasionally, the concept of the general interest or other similar formulations have been identified with that of the common heritage of mankind. In fact specific proposals were made during the Third United Nations Conference on the Law of the Sea to apply the common heritage concept to the waters overlying the seabed beyond the limits of national jurisdiction,²⁶ and distinguished writers of international law have expressed their concern that such a concept might be made applicable to high seas fisheries.²⁷

Despite the fact that the Convention on the Law of the Sea makes specific reference to the intrinsic unity of ocean space,²⁸ there are important differences between the general or common interest of the international community and the common heritage of mankind. The latter was a concept devised specifically in the context of particular international regimes, most notably the 1979 Moon Treaty²⁹ and the regime for seabed mineral exploitation embodied in Part XI of the Convention on the Law of the Sea and later accommodations thereto,³⁰ and cannot be extended beyond these regimes unless there is an express agreement to that effect. This has certainly not happened in relation to high seas fisheries and it is not likely to happen in the future, as it has not happened in the context of the long debate about the Antarctic Treaty System in the United Nations and elsewhere.³¹ On the other hand, the common heritage concept, while sharing with the high seas regime the purpose of nonappropriation, requires some additional elements that are not given in the case of other high-seas-related regimes, such as an international administration that might be able in certain respects to undertake exploitation on behalf of mankind and the sharing and distribution of benefits in a very broad context.

²⁶ See, for example, the statement by Lebanon in the Seabed Committee as to the collective organization of high seas fisheries, Doc. A/AC. 138/SC. 1/SR. 17, 9 August 1971; and by Mexico as to the establishment of an international authority for high seas fisheries, Doc. A/AC. 138/ SC. II/SR. 30, 29 March 1972.

²⁷ Shigeru Oda, *International Control of Sea Resources*, reprint with a new introduction, 1989, at xxvi.

²⁸ Convention on the Law of the Sea, preamble, para. 3.

²⁹ Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 1979, *International Legal Materials*, Vol. 18, 1979, 1434.

³⁰ Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea, 29 July 1994.

³¹ Francisco Orrego Vicuña, *Antarctic Mineral Exploitation*, 1988, 483–497.

Most importantly, while the high seas and fishing activities have been historically related to the concept of the freedom of the high seas, subject to the evolution and regulation described, the exploitation of seabed mineral activities was never included under such a principle in an unqualified manner,³² and even if in the view of some writers it was so included³³ the community of states promptly discarded this connection by means of the adoption of the 1970 Declaration of Principles Governing the Sea-bed and Ocean Floor which instituted the common heritage principle in the first place.³⁴ By its very nature the latter concept is founded on a legal approach entirely different from that of the freedom of the seas and hence the regimes relying on one or the other cannot be compared. Regulation of high seas freedoms is certainly different from collective undertakings.

The sequence of changes and developments that has been described could be understood by reference to the evolving historical conditions and interests and that may suffice to set out clearly its meaning and extent. There is, however, one other dimension of recent emergence that needs to be taken into account since it explains not only the nature of the changes taking place but also the significance of current trends, namely the environmental concerns prevalent today in the international community and public opinion and the corresponding influence this is exercising on international law as related to the environment.³⁵

In fact, as international environmental law has evolved since the 1972 Stockholm Declaration³⁶ and through the United Nations Conference on Environment and Development³⁷ and the important body of law at present characterizing this field,³⁸ conservation of fisheries and other

³² Francisco Orrego Vicuña, *Los Fondos Marinos y Oceánicos*, 1976, 233–235.

³³ For the debate about the application of the principle of the freedom of the high seas to the seabed and ocean floor, see the literature cited in Feith, “Rights to the sea bed and its subsoil,” report to the International Law Association, Brussels Conference, 1948, 2–5; José Luis de Azcarraga y Bustamante, “Los derechos sobre la plataforma submarina,” *Revista Española de Derecho Internacional*, 1949, at 80–81; Francisco Orrego Vicuña, *Los Fondos Marinos*, at 41–43, 235–237.

³⁴ United Nations General Assembly, Resolution 2749 (XXV), 17 December 1970.

³⁵ Edith Brown Weiss (ed.), *Environmental Change and International Law*, 1992, 124–158; Birnie and Boyle, *International Law*, 1992; Philippe Sands, *Principles of International Environmental Law*, 1995.

³⁶ United Nations Conference on the Human Environment, Stockholm Declaration on the Human Environment, 16 June 1972, *International Legal Materials*, Vol. 11, 1972, at 1416.

³⁷ United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, 14 June 1992, *International Legal Materials*, Vol. 31, 1992, at 874.

³⁸ See generally Birnie and Boyle, *International Law*.

marine resources is no longer solely a question of economic efficiency but one that touches upon the preservation of broad ecosystems and their fragile nature. The preservation of the marine environment is therefore not exclusively a problem of prevention and control of marine pollution but also a matter relating to the rational and effective management of fisheries and other resources. In this context regulatory functions acquire a new meaning while maintaining nevertheless the need to balance competing interests among nations.

It is relevant to mention that the main purpose of the developments discussed has not been to derogate from the freedom of fishing generally or in the high seas in particular, but only to subject this freedom to such restraints as are needed to ensure the broader objectives of conservation in so far as the successive stages have been unable to cope with the problems evidenced by experience and practice. The practical result of some of the restraints put into effect has been to derogate from such freedom in given instances and for specific purposes, as has happened in part with areas brought under the regulatory authority of national jurisdiction; but this has been so only because of the lack of more appropriate alternatives under international law by way of the enhancement of international cooperation and other arrangements. In point of fact, such developments were mainly prompted by both the failure of unrestricted fishing activities and the ineffectiveness of flag state jurisdiction to ensure necessary conservation in the high seas.³⁹

As the whole purpose of this evolution was to bring order to the question of access to resources and to ensure effective conservation, the issue lies not so much in the questioning of freedom of high seas fishing as in the availability of the appropriate means to ensure this end, an end that is important not only to coastal states' interests but also to the international community as a whole, including therein the legitimate interest of distant-water fishing nations. It follows that what is envisaged is not the end of the freedom of fishing but its adequate regulation so as to achieve those necessary objectives.

As will be discussed throughout this work, in so far as means to that end have been available under international law, unilateral or other equivalent forms of action have been both unnecessary and undesirable. However, to the extent that international law has been unable to provide the appropriate responses to the existing problems, then the search for

³⁹ Ellen Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, 1989, at 5-6.

solutions has opted for alternatives involving individual state action or approaches that seek to remove the obstacles emerging from the ineffectiveness of international cooperation.⁴⁰

The freedom of fishing in the high seas in customary international law

The freedom of fishing in the high seas became well established in customary international law in spite of the reservations that the concept had motivated since early times. Customary international law did little more than to state the existence of the principle; it did not purport to define its meaning and extent, except in the negative sense mentioned above that states should not interfere with such high seas freedoms. Furthermore, it should be noted that the freedom of fishing never stood as a customary rule quite clearly on its own but always in association with the freedom of the high seas generally. Since the latter was conceived for the specific needs of navigation it is arguable whether such existence by association was solid enough to support the pressure that time and experience would bring to bear upon it.

It is appropriate to keep in mind that, while freedom of navigation has stood unabated for a long historical period since the Grotian formulation, this has not been true of the freedom of fishing in the high seas. The former has survived the extension of national jurisdiction in the high seas, in terms of both the enlargement of the territorial sea and the establishment of coastal state rights over resources and other matters, but freedom of fishing has been restrained in various ways precisely because of its negative implications as to the goals of orderly access and conservation. In both cases there has been a growing regulation of the manner in which the freedom is to be exercised, but only in respect of freedom of fishing has the matter been controversial in the extreme.

On the other hand, the meaning of freedom of fishing in the high seas under customary international law cannot be taken in isolation from other rules that customary law has developed. That states are required to act with reasonable regard for the rights of others, that the abuse of rights is a controlling principle, and that equity has a preponderant role in the utilization of resources, are significant principles of customary

⁴⁰ Francisco Orrego Vicuña, "Coastal states' competences over high seas fisheries and the changing role of international law," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 55, No. 2, 1995, 520–535, at 526, 534.

international law that cannot be ignored in this context.⁴¹ Furthermore, these principles have given rise to a large body of treaty law and other sources relevant to the issue of conservation of living resources. However difficult the implementation of these principles might be in practice, the fact is that it would be wrong to state that customary law provides for the unrestricted freedom of fishing in the high seas. It provides for freedom indeed, but subjecting its exercise to other controlling principles that have also been received in the *corpus juris* of customary international law. This situation becomes still more evident when customary law is discussed in the context of international environmental law and the global reach of many of its obligations, particularly in so far as the high seas and areas beyond national jurisdiction are concerned.⁴²

Two leading decisions explain clearly the manner in which the freedom of fishing in the high seas has been connected to other relevant principles that provide a setting of restraint and control over its negative effects. First, in the *Bering Sea Fur Seals Arbitration*,⁴³ the central argument put by the United States was that it had a right to protection and property over such species even when found in the high seas beyond the limits of its territorial sea, invoking to this effect common and civil law principles, state practice, the law of natural history, and the common interests of mankind,⁴⁴ views that are not altogether different from those held in a number of recent controversies over fishing rights and coastal states' rights in the high seas. It is well known that the arbitral tribunal found for Great Britain and upheld the freedom of the high seas. However, in so finding it also recognized the need for conservation to prevent over-exploitation, the regulation of which was to be agreed by the participants in the fishery.⁴⁵ The customary rule was in the instance coupled with other requirements and even if these were to be agreed by the parties it nevertheless meant a recognition of the need for restraint in the exercise of the freedom concerned.

At the request of the parties the tribunal also provided for a conserva-

⁴¹ For a discussion of reasonable use, abuse of rights, and equity and equitable utilization as principles governing resource exploitation and protection of the environment under international law, see Birnie and Boyle, *International Law*, at 124–127.

⁴² See in particular Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. For the discussion of these and related developments, see Francisco Orrego Vicuña, "State responsibility, liability, and remedial measures under international law: new criteria for environmental protection," in Brown Weiss, *Environmental Law*, at 128–133.

⁴³ *Bering Sea Fur Seals Arbitration*, 1893, Moore, *International Arbitration Awards*, Vol. I, 755.

⁴⁴ Birnie and Boyle, *International Law*, at 493. ⁴⁵ *Ibid.*, at 494.

tion scheme, including aspects such as prohibited areas, closed seasons, limitation of the type of vessels, licensing, catch records, exchange of data, and other measures. A three-year ban on sealing was also recommended by the tribunal.⁴⁶ Here again, although these measures required state acceptance and national enforcement, the relevant point is that they curtailed the unrestricted freedom and provided for solutions to the existing problems of conservation. The solutions failed later on other grounds, namely that the conservation scheme did not cover all participants in the fishery and that reflagging took place to evade regulations,⁴⁷ a situation also known in contemporary practice; but in any event the precedent of combining customary law with conventional or other arrangements was duly set. Birnie and Boyle have evaluated this precedent as follows:

Thus, although it perpetuated the high seas freedom of fishing and hence made conservation more difficult, especially in relation to enforcement, the tribunal strongly supported the need for restraint in exploitation, clearly indicated the requisite measures, and recognized that freedom was not absolute but had to be regulated to take reasonable account of the interests of other states.⁴⁸

The same customary rule of freedom of fishing in the high seas was years later related to other relevant principles of international law in an entirely different manner, evidencing the changing meaning of the rule that had intervened. In fact, in the 1974 *Icelandic Fisheries* cases the International Court of Justice upheld the rights of fishing in the high seas, but given the nature of the dispute as to extended fisheries jurisdiction such rights were in the instance related to established fishing states, namely those that had been active in the areas concerned. In so doing the court also emphasized the obligation of reasonable use in connection with conservation and the preferential rights of coastal states in the allocation of high seas stocks in such areas. The obligation to undertake negotiations in good faith so as to reach an equitable solution was also underlined by the decision.⁴⁹

Freedom of fishing in the high seas was thereby made subject to coastal states' preferential rights, taking into account conservation needs, while seeking at the same time to accommodate the divergent interests of the states concerned by reference to the substantive principles of reasonable use and equitable arrangements in the allocation of resources. Although

⁴⁶ *Ibid.* ⁴⁷ *Ibid.*, at 495. ⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, at 118. See also Hannes Jónsson, *Friends in Conflict: The Anglo-Icelandic Cod Wars and the Law of the Sea*, 1982.

the cases were only concerned with limited extensions of coastal state fisheries jurisdiction and the historical rights held by other states, the conceptual changes embodied in the reasoning of the court as to the meaning of customary international law in the matter were in fact of a broad scope. It has been rightly concluded that this decision opened the way for the transfer to coastal state jurisdiction of much of the world's fishing resources, soon after to be expressed in the form of 200-mile exclusive economic zones and other claims, while also relating the customary rule to the novel concept of conservation for future benefit in the interest of sustainable utilization.⁵⁰

The contribution of this decision to the development of the law came too late in time since issues such as historical rights, coastal states' preferential allocation and others that the court discussed had been a matter of long debate leading to the 1958 and 1960 Conferences on the law of the sea. At the time the decision was rendered, state practice had already taken a strong turn towards the establishment of 200-mile exclusive fishing areas as evidenced by the preparatory work of the Third United Nations Conference on the Law of the Sea, the beginning of its deliberations and related legislative developments.

Nevertheless, it should be noted that the reasoning of the court in the *Icelandic Fisheries* cases is also applicable in certain respects to high seas fisheries as presently conceived, particularly as to the exercise of the freedom of fishing in the context of reasonable use, the role and need for conservation, the equitable allocation of resources, and good faith negotiations. While coastal states might claim on occasions a preferential right in such allocation, one important difference at present is that such claims are no longer related to a given spatial extension but to a functional role. As will be discussed below, this difference has greatly facilitated new accommodations under international law and the more active role of regional organizations in the process of accommodation and allocation.

Even in the context of exclusive economic zone claims the interests of distant-water fishing states were not ignored. Although the exclusive economic zone meant the reduction of the high seas to the areas beyond the 200-mile limit, a number of third states' interests and rights were kept within such zones in so far as fishing activities are concerned as a part of the balancing of interests between distant-water fishing nations and

⁵⁰ Birnie and Boyle, *International Law*, at 118–119.

coastal states that is characteristic of the solutions devised under international law in the matter.⁵¹

These developments in customary international law clearly show that the very same rule of freedom of fishing had different meanings at different points in time as determined by the changing contextual elements of state interests and practice. This is also noticeable in treaty developments and other arrangements, as well as in the opinion of leading writers on international law.

The *Bering Sea Fur Seals* arbitral decision and the proposed regime for conservation it contained had a decisive influence on the 1911 Convention for the Preservation and Protection of Fur Seals,⁵² which set out a model of conservation and international cooperation of long-standing significance. The broad participation of all states concerned proved to be an essential element of the success of conservation regimes ever since, and is still a fundamental requirement of contemporary arrangements. Various other international conventions on conservation and fisheries commissions would follow but their success would be rather limited because of the narrow concepts and powers underlying such regimes.⁵³ In spite of the failure of the 1930 League of Nations Conference on the Law of the Sea to tackle the issue of conservation and other relevant jurisdictional matters,⁵⁴ the pursuit of new approaches would be the central task of the successive United Nations Conferences on the Law of the Sea.

Distinguished writers on international law had also foreseen the need to undertake new arrangements and develop new concepts so as to ensure high seas fisheries conservation. Alvarez and Colombos had proposed in 1924 the establishment of an international commission with some management powers over given activities in the high seas, which in the view of the former were to include the prohibition of fishing in areas of the high seas, taking into account conservation needs, and the imposition of sanctions on vessels held to be in violation.⁵⁵ Schücking had similarly proposed the creation of an international bureau that would keep a

⁵¹ For a discussion of Article 62 of the Convention on the Law of the Sea, see Burke, *The New International Law*, at 62–68; and E. D. Brown, *The International Law of the Sea*, Vol. I, at 222–224.

⁵² Treaty for the Preservation and Protection of Fur Seals, Washington, 1911, *British and Foreign State Papers*, Vol. 104, at 175.

⁵³ Birnie and Boyle, *International Law*, at 495–502. ⁵⁴ *Ibid.*, at 502.

⁵⁵ For a discussion of the proposals by Alvarez and Colombos at the International Law Association Stockholm meeting of 1924, see Gidel, *Le Droit International*, Vol. I, at 19–22. For a similar proposal by M. de Magalhaes at the League of Nations Committee of Experts for the Progressive Codification of International Law, see *ibid.*, at 486.

registry of rights beyond certain areas, including the rights relating to a common use of the sea.⁵⁶ Suarez had advocated rules for the prevention of extinction of species and uniform regulations for the exploitation of resources, including reserved zones and closed periods.⁵⁷ Draft resolutions introduced by Strupp⁵⁸ and Gidel⁵⁹ at the Institut de Droit International in 1929 had enlarged the scope of the discussion even more by conceiving ocean space as a whole and empowering the proposed international commission to promote its use concerning navigation, transportation, communications, industry, and science, including the prevention of abuses, an approach which in Gidel's view came under his concept of *service public international*.⁶⁰

This broad conception of ocean use would inevitably pose the question of the extent of coastal state claims which was also actively discussed.⁶¹ With the basic terms of the debate set out in the early part of the century, it would take the best part of its second half to find the negotiated solutions under international conventions.

Fishing and conservation in the high seas under the 1958 Geneva conventions

The pressures that had been mounting on the issue of high seas fishing and related problems of conservation led to the confrontations that were characteristic of the 1950s.⁶² This in turn prompted important efforts at finding negotiated international settlements, the most prominent of which were the First United Nations Conference on the Law of the Sea and related technical and regional developments.⁶³ The Geneva Conference of

⁵⁶ Proposal by Schücking at the 1925 meeting of the League of Nations Committee of Experts for the progressive codification of international law, as commented upon by Gidel, *Le Droit International*, at 27–28.

⁵⁷ League of Nations, Committee of Experts for the Progressive Codification of International Law, "Exploitation of the resources of the sea," report by José León Suarez, January 1926, *American Journal of International Law*, Special Supplement, 20, July 1926, at 231.

⁵⁸ See the proposal made by Strupp at the Institut de Droit International, *Annuaire de l'Institut de Droit International*, Vol. 35, 1, 1929, Session de New York, at 155.

⁵⁹ Proposal by Gidel, *Annuaire de l'Institut de Droit International*, at 199. ⁶⁰ *Ibid.*, at 207.

⁶¹ See the comments by Strupp and Schücking, *Annuaire de l'Institut de Droit International*, at 165–166.

⁶² See generally Garcia Amador, *La Utilización* and Oda, *International Control*.

⁶³ See in particular the discussions by R. E. Charlier, "Résultats et enseignements des conférences du droit de la mer," *Annuaire Français de Droit International*, 1960, 63–76; Arthur H. Dean, "The Geneva Conference on the Law of the Sea: what was accomplished," *American Journal of International Law*, Vol. 52, 1958, 607–628; Nguyen

1958 approached the question on a two-track approach. First, there was the track of reaching an agreement on the problem of enlarged maritime areas subject to national jurisdiction, whether this took the form of an extension of the territorial sea or the establishment of adjacent fishing and other areas, or both. It is well known that this track failed rather dramatically both in the First Geneva Conference of 1958 and in the Second Geneva Conference of 1960.

The second track dealt with the question of high seas fisheries and conservation beyond the areas subject to national jurisdiction, whatever these might turn out to be.⁶⁴ However, since the most productive fishing areas would have come under some kind of coastal state jurisdiction and related compromises with distant-water fishing states, such as historical rights, fishing in the high seas was approached in a rather timid manner. Since the connection between the two tracks failed to materialize international law was left without coastal state extended jurisdiction and with limited rules on the high seas, a situation that was of course a poor answer to the difficult existing problems. The movement towards unilateral and regional action would gain momentum soon thereafter.⁶⁵

The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas,⁶⁶ in spite of its contextual shortcomings, was not devoid of significance as a step forward in the long process of evolution that international law had been experiencing in the matter. In fact, freedom of fishing in the high seas was recognized for the first time under a major international convention as being subject to treaty obligations, to the interests and rights of other states as provided for under such a convention, and to the conservation of the living resources.⁶⁷ These principles were meaningful at the time, particularly if contrasted with the freedom of competition that until then had prevailed and with the very limited proposals and arrangements that had introduced the principle of abstention in high seas fishing.⁶⁸

Quoc Dinh, "La revendication des droits préférentiels de pêche en haute mer devant les Conférences des Nations Unies sur le Droit de la Mer de 1958 et 1960," *Annuaire Français de Droit International*, 1960, 77-110.

⁶⁴ See generally André Gros, "La Convention sur la pêche et la conservation des ressources biologiques de la haute mer," *Recueil des Cours de l'Académie de Droit International*, 1959-II, 3-89.

⁶⁵ Birnie and Boyle, *International Law*, at 507.

⁶⁶ Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958, *United Nations Treaty Series*, Vol. 559, 285. Hereinafter cited as the 1958 Convention.

⁶⁷ Birnie and Boyle, *International Law*, at 503.

⁶⁸ For a discussion of the principle of abstention see Oda, *International Law*, at 56-90. See

In any event, even those modest principles were not coupled with the appropriate mechanisms to ensure any effectiveness.⁶⁹ Flag-state jurisdiction stood unabated as the sole source of authority over vessels in the high seas in spite of its poor record in ensuring enforcement of international obligations. The concept of these states being required to adopt conservation measures was therefore flawed in terms of its practical meaning.

The special interest of coastal states was referred to but again lacked appropriate implementation.⁷⁰ A limited degree of participation by such states in conservation arrangements was provided for, but the obligations of fishing states mainly related to the requirement to enter into negotiations with coastal states to agree on conservation measures.⁷¹ Unilateral measures could be adopted in the event of failed negotiations provided the requirements of urgency, appropriate scientific findings, and non-discrimination were met.⁷² No means of enforcement on foreign vessels in the high seas were made available unless this could be achieved under special agreement. If the approach of the 1958 Convention had innovated in respect of the principles conditioning the extent of freedom of fishing, this was certainly not the case as to the practical implications of the Convention.

Critical views would inevitably follow in connection with the overall results of the system devised in 1958. Conservation under the freedom of fishing, lacking effective regulation and enforcement, usually led to depletion as a normal course of conduct.⁷³ Also, allocation of the resources meant that each participant would take as much as it could and institutional mechanisms for control could only be established by agreement. Fisheries commissions have many times resulted in serious failures and political and economic manipulation has been a common occurrence.⁷⁴ Neither has effective dispute settlement been available. Even the concept of maximum sustainable yield on which conservation was based in the system of the 1958 Convention was open to criticism from both a

also generally United States Senate, Committee on Interstate and Foreign Commerce, "Hearing on implementing the International Convention for the High Seas Fisheries of the North Pacific Ocean, signed at Tokyo on May 9, 1952," 12 July 1954; United States House of Representatives, Committee on Merchant Marine and Fisheries, *ibid.*, 13 July 1954; Roy I. Jackson and William F. Royce, *Ocean Forum: An Interpretative History of the International North Pacific Fisheries Commission*, 1986.

⁶⁹ See the discussion by Birnie and Boyle, *International Law*, at 505–507.

⁷⁰ 1958 Convention, Art. 6. ⁷¹ *Ibid.*, Art. 4. ⁷² *Ibid.*, Art. 7.

⁷³ Burke, *The New International Law*, at 96–98.

⁷⁴ Birnie and Boyle, *International Law*, at 506.

scientific point of view and the requirements of broader approaches that were already known at the time.⁷⁵

It has been aptly concluded that “[t]he failure of this mode of dealing with resource conservation and allocation is mainly responsible for the large extensions of national jurisdiction over the past two decades.”⁷⁶ In fact, to the extent that the 1958 Convention did not provide effective answers only the freedom of fishing envisaged in Article 2 of the 1958 Convention prevailed as the governing rule on the matter, a situation that would not stand the pressures at hand on law of the sea questions. Extended coastal state jurisdiction would follow soon thereafter together with new compromises and conservation approaches that came to characterize the Third United Nations Conference on the Law of the Sea.

The changing role of international law on high seas fisheries

As a result of the above the expanding exercise of jurisdiction by coastal states over maritime areas became the salient characteristic of the contemporary law of the sea. This phenomenon, however, needs to be measured against two very different reactions from international law over time.⁷⁷ During a long period international law evolved as the consequence of a confrontation between the different interests of coastal states and distant-water fishing nations. While the first group pressed for increased jurisdiction and control over key fishing grounds, partly on the ground of the need to ensure appropriate conservation and partly on that of securing exclusive fishing rights, the second group sought to rely on the traditional rules protecting the freedom of the high seas.

A first expression of these competing views at the global level came on the occasion of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, as discussed, but the issues associated with the breadth of the territorial sea, and later the establishment of the exclusive economic zone and other maritime claims, were also the outcome of a similar pattern of confrontational attitudes. These would not come to an end with the Third United Nations Conference on the law of the sea, although the contentious aspects would be narrowed down to very specific questions that were left pending or which were insufficiently treated. Prominent among such questions were high seas fisheries in general, and highly migratory species and straddling stocks in particular,

⁷⁵ *Ibid.*, at 435–440.

⁷⁶ Burke, *The New International Law*, at 95.

⁷⁷ See generally Orrego Vicuña, “Coastal states’ competences.”

all of it spatially redefined to the new area of the high seas as resulting from that conference.

It should be noted, however, that, as conservation needs became more pressing worldwide and the matter became closely related to major environmental issues, the evolution experienced by international law in the matter took on a very different meaning as compared to earlier periods. The question would no longer be whether coastal states could or should devise new maritime areas for the exercise of given forms of jurisdiction, eroding further the area of the high seas, but rather whether, in view of evident problems that needed to be solved, the pertinent answers should be provided by coastal states or negotiated by interested parties or the international community as a whole.

Two important implications would follow from this redefinition of the question. First, the issue would no longer be whether some fisheries activities should be regulated or unrestricted, but who should undertake the appropriate regulatory functions and to what extent. Secondly, the high seas could no longer be considered an area free from certain regulations just as coastal states' maritime areas can no longer be regarded as the sole source of jurisdictional authority. In this new context the principle of the freedom of the high seas is not derogated from but it is no longer tantamount to uncontrolled or depredatory fishing activities.

The experience gathered in the past few decades in terms of the interaction of national claims and the response of international law, not unlike many other historical experiences, reveals that the issue lies not in establishing new maritime areas but in the exercise of badly needed regulatory authority or the introduction of individual rights to ensure conservation in high seas fisheries. The option of doing so under international law or under unilateral state action depends essentially on the effectiveness and timeliness of the solutions envisaged.

Important occasions such as the First and Second United Nations Conferences on the Law of the Sea missed the opportunity to provide the solutions sought at the time. In so far as freedom of fishing in the high seas continued uncontrolled, the trend was away from the prospects of international cooperation and towards extended coastal states' claims. The Third United Nations Conference on the Law of the Sea proceeded differently and managed to achieve important solutions, while providing at the same time the framework for further advancement of the law, as has happened precisely with the issue of high seas fisheries.

The evolving role of international law also shows that a negotiated international solution has always been the preferred alternative, but this

means in turn that such a solution needs to be effective to cope with the underlying problems. Should this not be the case then unilateral options again become active. In the course of this evolution new principles, concepts, and views have emerged to address effectively the pending problems by means of the development of international cooperation, thereby avoiding the continued situation of uncontrolled high seas fishing operations that would result in serious damage both to international law and to the collective interest of the community of nations. The role of the Third United Nations Conference on the Law of the Sea, state practice, and recent global and regional agreements in advancing this evolution will be examined in the chapters that follow.